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No. 09-1255

IN THE
Supreme Court of the United States

PATRICIA LIMMER, BILLYE JOYCE SMITH, AND BOBBY JEAN NOTHNAGEL,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

BRIEF OF CONSTITUTIONAL AND ADMINISTRATIVE LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the federally funded addition of a component of a warning device (retroreflective tape) to an existing warning device (a crossbuck warning sign) at a railroad crossing is the installation of a "warning device" under 23 C.F.R. § 646.214(b)(3) and (4) so as to preempt state-law claims of negligence under this Court's decisions in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000), where federal regulations define "[p]assive warning devices" as "traffic control devices," 23 C.F.R. § 646.204, and the responsible federal agency has ruled that retroreflective tape is not a "traffic control device."

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INTEREST OF *AMICI CURIAE*[*]

Amici are law professors who teach and write in the areas of constitutional and administrative law.[1] *Amici* wish to promote coherence both in judicial interpretation of preemptive federal statutes and regulations governing grade-crossing safety and in the judicial approach to regulatory preemption issues generally. The decision in this case will have wide-ranging consequences not only for victims of rail accidents, but also for the scope of permissible regulatory preemption and the balance of federal and state regulatory authority in general.

STATEMENT

This petition presents this Court with the opportunity to clarify two important issues in preemption law. First, the Texas Supreme Court failed to apply the presumption against preemption, *see Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), in interpreting preemptive federal railroad regulations, despite this Court's recent emphasis on the applicability of that presumption in *all* preemption cases. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). The *Rice* presumption is an important canon governing judicial interpretation of the preemptive scope of federal law that maintains

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[*] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties were provided notice of *amici*'s intention to file this brief on May 7, 2010, as required by Rule 37.2(a), and that all parties have consented to the filing of this brief.

[1] A full list of *amici* is set forth in the Appendix to this brief.

the constitutional balance of federal and state authority. The presumption unquestionably applies here and requires the conclusion that petitioners' claims are not preempted.

Second, the Texas Supreme Court adopted the wrong approach for resolving ambiguities in the preemptive scope of the federal regulatory regime governing rail safety. This Court's administrative law and federalism decisions suggest that, where Congress has both expressly stated its preemptive intent in a statute and delegated preemptive rulemaking authority to an agency, the scope of preemptive federal regulations should be constrained by Congress's preemptive intent. The Texas Supreme Court's holding that essentially any federally funded alteration of grade-crossing safety equipment preempts stricter state-law requirements should be rejected because it is inconsistent with congressional intent.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD MAKE CLEAR THAT THE PRESUMPTION AGAINST PREEMPTION APPLIES TO *EVERY* PREEMPTION QUESTION

This Court first articulated a "presumption against preemption" in *Mintz v. Baldwin*, 289 U.S. 346, 350–52 (1933), and the canonical formulation is found in *Rice*: courts in preemption cases must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 331 U.S. at 230. The presumption applies equally to questions of statutory and regulatory preemption. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715–16

(1985). The Texas Supreme Court reached the wrong result by failing to apply the presumption here.

A. The Presumption Against Preemption Is An Essential Component Of Federalism Doctrine

The evolution of Commerce Clause jurisprudence has created a world in which nearly everything is subject to concurrent state and federal regulatory authority. As a result, the most important federalism questions concern not what Congress *can do* as a matter of constitutional power, but rather what Congress *has done* and how much room it has left for state regulation. *Compare, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005) (construing Congress's Commerce Clause power broadly to allow regulation of homegrown medical marijuana), *with Gonzales v. Oregon*, 546 U.S. 243 (2006) (construing the Controlled Substances Act *not* to authorize the Attorney General to preempt Oregon's Death with Dignity Act).

The pre-*Rice* approach was that any federal regulation in a field broadly preempted state law. *See, e.g., Chicago, R.I. & Pac. Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U.S. 426, 435 (1913). That worked only as long as federal regulatory authority was narrowly confined. The *Rice* presumption was developed alongside the New Deal's expansive judicial interpretations of congressional power, *see, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942), and is complementary. As federal power expanded, continued application of the pre-*Rice* presumptive-field-preemption rule would have quickly eradicated state regulatory authority. The *Rice* presumption provided a way to maintain a viable role for state governments even as federal

authority was extended to nearly every subject. *See generally* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 806 (1994).

The *Rice* presumption embodies the understanding that structural and political safeguards are the primary mechanisms for protecting states against federal encroachment and that the main task of judicial federalism doctrine is to reinforce those safeguards. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–54 (1985); *see generally* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 130–34 (2004). As the Supreme Court explained in *Gregory v. Ashcroft*:

> [I]nasmuch as this court in *Garcia* has left primarily to the political process the protection of states against intrusive exercises of Congress's Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

501 U.S. 452, 464 (1992) (quoting LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 480 (2d ed. 1988)). Two essential federalism safeguards are: (1) the political representation of the states in Congress, which provides opportunities for states to oppose federal encroachment on their regulatory authority, *see* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); and (2) the difficulty of navigating the Article I legislative process, which keeps the overall volume of

preemptive federal legislation down, *see* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1330 (2001).

The presumption against preemption is the most important judicial tool for reinforcing these structural protections for federalism. This Court's application of the *Rice* presumption in two recent preemption decisions—both involving expansive federal regulatory schemes alleged to preempt traditional state remedies for torts or deceptive trade practices—reemphasizes the presumption's status as a centerpiece of judicial federalism doctrine. *See Wyeth*, 129 S. Ct. at 1194–95 (applying the presumption and holding state tort claims not preempted by the Federal Food, Drug, and Cosmetics Act's drug labeling provisions or regulations); *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543–44 (2008) (applying the presumption and holding state deceptive trade practice laws not preempted by the Federal Cigarette Labeling and Advertising Act).

The rationale for the presumption against preemption applies equally, if not with more force, where the allegedly preemptive federal law is an administrative regulation. The national legislative process's "built in" federalism safeguards support the presumption that ambiguity regarding preemption in a federal statute reflects the absence of congressional intent to preempt state law. While state interests may be represented adequately in federal administrative processes, agencies nevertheless lack the constitutionally mandated features of Congress that comprise durable federalism protections.[2] If

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[2] As Justice Stevens noted, "[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate

agencies *do* adequately represent state interests, narrow construction of preemptive regulations under the *Rice* presumption is justified for the same reason it is justified in statutory interpretation: narrow interpretations will best approximate the preemptive scope intended by a federalism-conscious agency.[3] And if agencies are *less* responsive to federalism concerns than Congress, narrow judicial interpretations according to the *Rice* presumption will protect the federalism values that administrative processes under-protect.[4] Accordingly, this Court has held that the presumption against preemption applies equally where state law is purportedly preempted "by an agency, acting pursuant to congressional delegation." *Hillsborough County*, 471 U.S. at 715–16.

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comprehensive and detailed regulations that have broad preemption ramifications for state law." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting). *See generally* Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111 (2008).

[3] As the Court explained in *Hillsborough County*, Congress might delegate authority to an agency to preempt state law by regulation because "the agency can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements." 471 U.S. at 721. The reality of this perceived agency advantage is a subject of intense debate. *See generally* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1971–74 (2008); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 755–56 (2008) [hereinafter Merrill, *Preemption*]; Nina A. Mendelson, *The California Greenhouse Gas Waiver Decision and Agency Interpretation: A Response to Professors Galle and Seidenfeld*, 57 DUKE L.J. 2157, 2158 (2008); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 774–77 (2004).

[4] *See* Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 876–81 (2008).

Recent cases demonstrate that preemption typically involves central state regulatory concerns—including regulation of local telephone markets, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), protection of state waterways from oil spills, *United States v. Locke*, 529 U.S. 89 (2000), state healthcare policy, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), medical ethics, *Gonzales*, 546 U.S. 243, and state tort remedies, *Wyeth*, 129 S. Ct. 1187; *Altria*, 129 S. Ct. 538; *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005). Because of their subject matter and the frequency with which they arise, the stakes for federalism in preemption cases are particularly high. As Justice Breyer observed:

> [I]n today's world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional effort to trim Congress' commerce power at its edges, . . . or to protect a State's treasury from a private damages action, . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.

Egelhoff v. Egelhoff, 532 U.S. 141, 161 (2001) (Breyer, J., dissenting). For this reason, it is essential to view preemption cases as not just about the technical details of the federal statute at issue, but also about the broader *constitutional* concern of maintaining balance in our federal system. The presumption against preemption is the primary judicial tool for maintaining that balance.

B. The Presumption Applies With Particular Force Where, As Here, Federal Law May Displace Exercises Of Traditional State Police Powers

This Court has in the past suggested that the presumption against preemption may apply, not in every preemption case, but rather only in cases involving federal encroachment on areas of "traditional" state authority.[5] But *Wyeth* makes clear that the presumption applies "in *all* preemption cases, and *particularly* in those in which Congress has legislated in a field which the States have traditionally occupied." 129 S. Ct. at 1194 (internal quotation marks and brackets omitted, emphasis added); *see also Altria*, 129 S. Ct. at 543 (quoting *Lohr*, 518 U.S. at 485) (holding that the presumption against preemption "'applies with particular force when Congress has legislated in a field traditionally occupied by the States'").

Applying the presumption in all cases is the better approach. If a significant federal regulatory presence were sufficient to render the *Rice* presumption inapplicable, then there would be virtually no cases in which to apply it. Today there is significant—though not exclusive—federal regulation in nearly every field. Thus lawyers can characterize almost every case as falling within a traditionally federal *or* state regulatory field, depending on their purposes. This case provides an exceptionally vivid example: If mere federal funding for some reflective tape on

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[5] *Compare, e.g.*, *Locke*, 529 U.S. at 108 ("[A]n assumption of non pre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence."), *with Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (stating that the presumption against preemption applies in "all pre-emption cases").

a crossing sign is sufficient to displace the *Rice* presumption, then the concept of a significant federal presence has been extended to its logical—but absurd—conclusion.

It was this very difficulty in drawing sharp distinctions between areas of state and national authority that prompted the Court to abandon its restrictive reading of the Commerce Clause after 1937. In rail safety, as in most other areas, there in fact has been significant federal *and* state regulation for some time.

The presumption unquestionably applies here, where the target of the preemption claim is state tort law prescribing duties of care for railroads and providing remedies for victims of rail accidents. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664–65 (1993). The Court has repeatedly emphasized the *Rice* presumption where state attempts to protect health and safety are at issue, *see Hillsborough County*, 471 U.S. at 719; *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981), and has noted that tort law is an essential tool for states in exercising this historic police power, *see Lohr*, 518 U.S. at 475, 484–85.

Moreover, the presumption against preemption should have particular force here because state law has played an important role in governing railroads since the earliest days of the industry. Before federal entry into the regulatory field, states were the acknowledged primary regulators of railroads. The nature of federal railroad regulation from its inception has been to carve out niches of federal

exclusivity from a backdrop of general state regulatory power.[6]

Thus, even under the now abandoned pre-*Rice* automatic field preemption rule, this Court recognized that, until Congress displaced it by statute, states had authority to regulate rail safety. *See Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U.S. 96, 99–100 (1888) ("Until [federal] legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits."). Indeed, the Court recognized the traditional application of state common law to rail crossings more than a century ago, holding that tort duties may legitimately require a railroad to take additional precautions "even though it may have complied literally with the terms of a statute prescribing certain signals to be given, and other precautions to be taken by it, for the safety of the traveling public at crossings." *Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408, 420–21 (1892); *see Continental Improvement Co. v. Stead*, 95 U.S. 161, 164 (1877) (explaining that trains approaching crossings must give "reasonable and timely warning").

In *Easterwood*, the Court reaffirmed that the default regulatory regime for railroad crossings includes peacefully coexisting state tort law and federal safety regulations. *See* 507 U.S. at 667–68. Indeed, the Court suggested that negligence liability may *complement* other state and federal efforts to increase crossing safety by "encouraging railroads —the entities arguably most familiar with crossing

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[6] *See* Gardbaum, *supra*, at 803–05; THOMAS O. MCGARITY, THE PREEMPTION WAR 67 (2008) ("Throughout most of the nation's history, conduct at grade crossings was governed by a combination of state laws, local ordinances, and common law duties. . . .").

conditions—to provide current and complete information to [a] state agency responsible for determining priorities for improvement projects in accordance with" federal regulations requiring states to establish a "highway safety and improvement program" and "a program for the elimination of [rail-crossing] hazards" in exchange for federal funds. *Id.* at 665-66 & n.6, 668; *see* 23 C.F.R. pt. 924; 23 C.F.R. § 1204.4.[7] The Court rejected the argument that the provision of federal crossing safety guidance, alone, was intended to unsettle this long-standing, multi-layered regime. *See* 507 U.S. at 665-66 & n.6, 668.

In a report on crossing safety that Congress requested in the Federal Railroad Safety Act of 1970 ("FRSA"), the Secretary of Transportation emphasized the value of state tort liability in ensuring "continuing interest on the part of the railroads in bringing about a reduction in grade crossing accidents." U.S. Dep't of Transp., Federal Railroad Admin. & Federal Highway Admin., *Report to Congress, Railroad-Highway Safety – Part II: Recommendations for Resolving the Problem* 103 (1972) [hereinafter *Crossing Safety Report II*]. Where federal and state regulation overlap and complement each other in this way, a claim of regulatory preemption must be supported by

[7] The symbiotic relationship between prospective regulation and retrospective liability is recognized in a variety of contexts. *See, e.g.*, William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1574, 1585 (2007) ("[T]he different actors and modalities of state common law litigation make it a critical, although only partial, antidote to predictable sorts of government failures."); Aaron S. Kesselheim & Jerry Avorn, *The Role of Litigation in Defining Drug Risks*, 297 J. AM. MED. ASS'N 308, 308-09 (2007) (giving examples); *Bates*, 544 U.S. at 451 (noting a similar role for tort law in pesticide regulation).

evidence "that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough County*, 471 U.S. at 716.

Congress, too, has consistently recognized and preserved the important, complementary role of state law, and particularly state tort remedies, in legislating to improve the safety of railroad crossings. Despite numerous federal rail-safety improvement appropriations in the first half of the twentieth century, states retained primary regulatory jurisdiction over railroad crossings. *See Nashville, C. & St. L. Ry. Co. v. Walters*, 294 U.S. 405, 413–414 & n.3 (1935) (collecting cases). The FRSA expressly reaffirmed the states' role in monitoring dangerous crossing conditions, *see* 49 U.S.C. § 20105, regulating crossing safety generally, through tort law or otherwise, until the issuance of specific federal regulations "covering the subject matter" of state measures, *id.* § 20106(b), and regulating crossing safety with respect to "essentially local hazard[s]" so long as state regulations do not conflict with federal requirements or burden interstate commerce, *id.* § 20106(c).[8]

The Texas Supreme Court ignored the *Rice* presumption and selected an interpretation of the Federal Highway Administration's ("FHWA") regulations that contravenes Congress's regulatory goals and the scope of preemption Congress

[8] Federal regulations also expressly contemplate the application of state safety standards to grade crossings. *See* 23 C.F.R. § 646.214(b)(1) ("All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways *supplemented to the extent applicable by State standards*") (emphasis added).

contemplated. Settled doctrine requires a different result.

II. THE COURT SHOULD TAKE THIS OPPORTUNITY TO CLARIFY THE RULES FOR RESOLVING AN IMPORTANT CATEGORY OF ADMINISTRATIVE PREEMPTION ISSUES

This Court has held that "[f]ederal regulations have no less pre-emptive effect than federal statutes," *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982), and that the presumption against preemption applies in determining preemptive effect of federal regulations as well as statutes, *Hillsborough County*, 471 U.S. at 716. Yet substantial uncertainty still surrounds regulatory preemption issues. *See generally* Young, *Executive Preemption*, *supra*. This case is an opportunity to clarify the approach to an important category of cases in this area: those involving a federal statute that contains express preemption language and a delegation of preemptive rulemaking authority to an agency.

Clarifying the doctrine and providing guidance to lower courts on administrative preemption issues is critical, first, because administrative agencies far outpace Congress in the production of substantive federal law. *See INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting). Thus, agency actions are likely to arise in many preemption cases. Second, because preemption directly impacts the allocation of regulatory authority between the federal and state governments, it is especially important for this Court to establish stable rules that give fair notice to state and federal regulators of how the scope and effect of regulatory preemption should be determined. *Cf. United States v. Lopez*, 514

U.S. 549, 630–31 (1995) (Breyer, J., dissenting) (emphasizing the importance of certainty in defining the relative scope of state and federal power).

Here, Congress's delegation of preemptive rulemaking authority to the FHWA means that federal regulations will ultimately establish the specific federal safety standards that preempt state law "covering the same subject matter." In these circumstances, the approach most consistent with this Court's decisions is to construe the preemptive scope of such regulations with both Congress's intent and the presumption against preemption firmly in mind. Interpretations that stretch beyond Congress's preemptive intent should be rejected.

A. Congress's Preemptive Intent Should Guide Interpretation Of Federal Regulations Issued Under Delegations Of Preemptive Rulemaking Authority

The Constitution's Supremacy Clause identifies three categories of supreme federal law: "This Constitution," "the Laws of the United States which shall be made in Pursuance thereof," and treaties. U.S. CONST. art. VI, cl. 2. This Court's holding that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation," *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986), confirms what the Supremacy Clause would in any event require: an agency's authority to preempt state law is entirely derivative of Congress's authority. Thus, in cases involving agency actions, Congress's intent remains the "ultimate touchstone" of preemption analysis. *See, e.g.*, *Lohr*, 518 U.S. at 485–86.

This Court, following the presumption against preemption, construed the scope of the FRSA's express preemption provision narrowly in *Easterwood*. *See* 507 U.S at 663–64. That provision preserves state law "related to railroad safety" until a federal regulation "covering the subject matter of the State requirement" is issued. 49 U.S.C. § 20106. The Court explained that "'covering' is a more restrictive term" than, for example, "relating to," and thus "pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Easterwood*, 507 U.S at 663–64. Two FHWA regulatory provisions may "cover" the subject matter of state tort duties relating to the safety of rail crossings: 23 C.F.R. §§ 646.214(b)(3) and (b)(4). *See Easterwood*, 507 U.S. at 670; *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 354 (2000). These provisions "establish a standard of adequacy that 'determine[s] the devices to be installed' when federal funds participate in [a] crossing improvement project." *Shanklin*, 529 U.S. at 354 (quoting *Easterwood*, 507 U.S. at 671). Where applicable, these FHWA "standard[s] of adequacy" constitute specific federal requirements for crossing safety that "substantially subsume the subject matter of" state tort law that would otherwise determine railroads' legal duties regarding crossing safety. *Id.* In short, here preemption turns on whether or not § 646.214(b)(3) or (b)(4) applies to the Front Street crossing.

An important question in cases like this is how courts should construe agency regulations that have this preemptive effect. Alongside the presumption against preemption, the scope of *Congress's*

preemptive intent should constrain interpretation of preemptive federal regulations.[9]

There are two broad categories of preemptive actions by federal agencies. Congress's preemptive intent is the touchstone, but that intent may be ambiguously expressed in a given federal statute. An agency with delegated authority to implement such a statute might address that ambiguity by issuing a formal interpretation of the statute's preemptive scope. *See, e.g.*, *Wyeth*, 129 S. Ct. at 1200–01 (discussing such an interpretation issued in a regulatory preamble by the Food and Drug Administration). The degree of deference, if any, warranted for such agency interpretations of the preemptive effect of federal statutes is unsettled. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 20–21 (2007).[10]

The agency also might simply issue preemptive regulations, believing them to be within its delegated authority. Put differently, an agency may itself take action, pursuant to a delegation of authority from Congress, that preempts state law. This case falls into this second category of preemptive agency actions. This Court's *Chevron* jurisprudence may require deference to the agency's conclusion that the statutory delegation includes authority to preempt

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[9] *Cf. Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2719–20 (2009) (rejecting an interpretation of preemptive regulations issued under the National Bank Act based, in part, on inconsistency with statutory evidence of Congress's intent regarding the scope of preemption).

[10] *See also* Nina A. Mendelson, *A Presumption Against Agency Preemption: Federal Agency Authority to Preempt State Law*, 102 NW. U. L. REV. 695 (2008) [hereinafter Mendelson, *Presumption*]; Merrill, *Preemption*, *supra*; Garrick B. Pursley, *Avoiding Deference Questions*, 44 TULSA L. REV. 557 (2009).

by regulation. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).[11] And, here, a seeming paradox may arise. Application of the *Chevron* doctrine in the preemption context is in tension with *Rice*, which cautions courts not to find state law preempted where Congress's preemptive intent is not "clear and manifest." 331 U.S. at 230. If the court defers to the agency, it risks allowing preemption beyond what was contemplated in the state-protective legislative process. *Cf. Garcia*, 469 U.S. at 550–54. That result means that Congress may, through delegation, remove preemption questions from the forum of federalism's process safeguards, or, perhaps, that the agency may take action that is beyond the authority Congress delegated.[12] Either way, deference produces tension with the process federalism rationale for the *Rice* presumption. Of course, agency actions, including preemptive regulations, are impermissible if they clearly exceed the agency's delegated authority. *See Louisiana Pub.*

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[11] The Court has applied *Chevron* deference to an agency's interpretation of the scope of its statutory jurisdiction. *See CFTC v. Schor*, 478 U.S. 833, 844–45 (1986); *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 n.7 (1984); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380–82 (1988) (Scalia J., concurring) (citing examples).

[12] Both possibilities are problematic in the light of this Court's canons for construing delegations of agency authority in a way that avoids constitutional doubts. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001) (declining to construe delegation of authority to an agency to allow actions that push the outer limit of the Commerce Clause power); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (stating the general rule that statutes should be construed in a manner that avoids raising doubts about their constitutionality). *See generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000).

Serv. Comm'n, 476 U.S. at 369–70. Where the substance of a preemptive regulation seems to fall within an agency's delegated authority but Congress's intent is unclear regarding the extent to which state law should be preempted by the federal regulatory regime established in a statute, the question of whether the agency's authority should be construed to include preemptive authority is very difficult. The proper scope of executive power to preempt state law without clear congressional authorization is a contested question.[13]

These concerns are less pointed here because Congress, in the FRSA, has clearly expressed its preemptive intent and the scope of the agency's delegated authority.[14] Under the circumstances, it is a relatively simple matter for the Court to avoid both the tension between its doctrines for construing Congress's delegatory and preemptive intent, on the one hand, and the specter of constitutional doubt raised by accepting agency conclusions about the preemptive scope of federal statutes in the absence of clear congressional intent, on the other. Deference to agency interpretations is justified in part by the belief that agencies often will be most familiar with, and thus best suited to interpret, the statutes they administer. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). Similar reasoning suggests that, where Congress's preemptive intent is clear, agencies will presumably tailor preemptive regulations closely to Congress's

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[13] *See* Young, *Executive Preemption*, *supra*, at 894–97; Mendelson, *Presumption*, *supra*, at 706–25.

[14] *Cf. Easterwood*, 507 U.S. at 664 (explaining that, for statutes with express preemption provisions, "the plain wording of" those provisions "necessarily contains the best evidence of Congress' pre-emptive intent").

intent. When choosing between competing interpretations of a preemptive federal regulation, the approach that best fits with existing doctrine is to select the interpretation most consistent with Congress's preemptive intent. *Cf. Wyeth*, 129 S. Ct. at 1216–17 (Thomas, J., concurring) ("[T]he Supremacy Clause . . . accords pre-emptive effect to only those policies that are actually authorized by and effectuated through the statutory text"). Non-preemptive interpretations of federal regulations create no tension with *Rice*; thus, not surprisingly, most of the cases in which this Court has followed agency views about preemption involved agency findings of *no* preemption. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 68 (2002); *Lohr*, 518 U.S. at 495; *Hillsborough County*, 471 U.S. at 716–18.

B. The Texas Supreme Court's Interpretation Of FHWA Regulations Contravenes Congressional Intent And Raises Constitutional Doubts

Congress's stated purpose in enacting the FRSA was "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. To that end, Congress concluded that "there can be, should be and must be a substantial upgrading of the level of railroad safety." H.R. Rep. No. 91-1194 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4104, 4105. Where "federal funds participate in the installation of warning devices," federal regulations become the preemptive "standard for the adequacy" of safety equipment at the crossing. *Easterwood*, 507 U.S. at 671; *Shanklin*, 529 U.S. at 357. The content of this federal "standard of adequacy," and thus the scope of

preemption, turns on what constitutes a "warning device" under the regulations. The regulations must be interpreted, however, in the light of Congress's broad goal of improving safety above the baseline that the federal regime was designed to augment.

Congress and the agency have long considered crossbuck signs to be the minimum safety precaution required at a railroad crossing. The Secretary of Transportation's report to Congress emphasized that thousands of grade crossings lacked even this minimum warning device. *See* U.S. Dep't of Transp., Federal Railroad Admin. & Federal Highway Admin., *Report to Congress, Railroad-Highway Safety – Part I: A Comprehensive Statement of the Problem* 67 (1971). The Secretary stressed that "[i]nstallation of these [crossbuck] signs would be made without any prior benefit-cost analysis, on the basis that *this is a mandatory minimum requirement for safety*." *Id.* (emphasis added). One of the Secretary's primary recommendations was to provide federal funding for crossbuck signs at all crossings as quickly as possible. *See Crossing Safety Report II*, at 90. In response, Congress enacted the 1973 Federal Railway-Highway Crossings Program, under which the FHWA regulations at issue here were promulgated. The statute provided federal funds to ensure that states would "[a]t a minimum . . . provide signs for all railway-highway crossings." 23 U.S.C. § 130(d); *see Shanklin*, 529 U.S. at 360 (Ginsburg, J., dissenting).

To be sure, Congress delegated authority to the agency to establish specific federal standards for railroad crossing safety equipment. But all delegations must contain an intelligible principle to guide agency discretion. *See Whitman v. American Trucking Co.*, 531 U.S. 457, 472 (2001); *J.W.*

Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). Congress's goal of improving crossing safety, viewed in the light of the consensus that crossbuck signs were (and are) the bare minimum of safety equipment needed at *every* crossing, suggests that Congress did not intend, nor could the agency reasonably understand Congress to have intended, to permit issuance of federal safety standards requiring anything less effective than crossbucks. It seems more likely that Congress viewed installation of crossbucks at all grade crossings as a necessary, but certainly not sufficient, initial step toward improving safety. Any preemptive federal standard for "adequate" crossing safety equipment laxer than the minimal requirement of crossbucks seems straightforwardly at odds with Congress's purpose.

But the Texas Supreme Court's interpretation of the regulations imputes to FHWA the promulgation of exactly such a standard. *See* Pet. App. 20a ("[W]e conclude as a matter of law that the application of retroreflective tape to the crossbucks at the Front Street crossing was an installation of a federally funded and approved warning device."). That interpretation has no limiting principle. It rests on reading "passive warning device" in the regulations to include any "marking." Under the court's interpretation, essentially anything could be a "marking." If applying retroreflective tape to some surface at a grade crossing constitutes "installation of a warning device" within the meaning of 23 C.F.R. § 646.214(b)(4), then, following *Easterwood* and *Shanklin*, federal funding for the application of retroreflective tape would constitute federal "approval" of the tape alone as "adequate" for safety at grade crossings where tape was deployed. Supplementary state regulations or tort law

requiring more than the application of the tape to, say, the trunk of a tree near an otherwise unmarked grade crossing would be preempted by this federal "standard of adequacy." Tape alone provides less warning than even the bare minimum crossbuck sign. Such a broad reading of the preemptive FHWA standard undermines Congress's safety-enhancement goal, the very reason for including preemptive language in the FRSA to begin with. Congress, having repeatedly recognized the value of overlapping state and federal regulatory authority for increasing crossing safety, simply cannot have intended that result.

If the Texas Supreme Court's interpretation of the substance of the preemptive federal standard had been advanced by the FHWA, there would be legitimate doubts about whether the agency had exceeded its delegated authority to preempt state law. That authority, again, must be defined by reference to Congress's intention to increase crossing safety above the status-quo level. A net-safety-reducing standard is inconsistent with that intention. That problem is easily avoided here, however, because the FHWA has taken the opposite view: that retroreflective tape is not a "traffic control device," Pet. App. 116a, meaning that it is not a "warning device" under 23 C.F.R. §§ 646.204 and 646.214(b)(4). An agency's interpretation of its own regulation ordinarily is entitled to substantial deference "unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).[15] In any event, the agency's view

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[15] The Texas Supreme Court's invocation of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), was inapt. *See* Pet. App. 18a. *Skidmore* is a standard of deference for agency interpretations

constitutes strong evidence that the agency did not intend its regulations to preempt state tort law under these circumstances. Evidence of agency intent *not* to preempt should be dispositive unless the text of the regulation *compels* the contrary conclusion. *See Hillsborough County*, 471 U.S. at 714–15. Here it does not.

The agency's construction is more consistent with Congress's purpose and the traditional overlap of federal and state authority on railroad safety matters. It is also consistent with the President's recent directive that agencies make decisions about preemption cautiously and only after considering the scope of their authority and state interests. *See Memorandum: Preemption*, 74 Fed. Reg. 24,693 (May 20, 2009). Even if the Court were to disregard all that and consider the agency's interpretation and that of the Texas Supreme Court to be equally plausible, the presumption against preemption requires breaking that tie in favor of the agency's interpretation, which preempts more narrowly.

CONCLUSION

The petition for a writ of certiorari should be granted.

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of federal *statutes* that do not satisfy *Chevron*'s requirements. *See Gonzales*, 546 U.S. at 255–56. Nor is either factor that motivated the *Shanklin* court to reject the agency's interpretation of its own regulations—a recent change in agency position seemingly related to litigation or inconsistency with the plain meaning of the regulations—present here. *Cf. Shanklin*, 529 U.S. at 354–56.

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APPENDIX

APPENDIX

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